Supreme Court, U.S.
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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

_____

WILLIAM DONNIE ASHLEY,

Petitioner,

vs.

CITY OF HUNTSVILLE, ET AL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

E. RAY McKEE, JR.
ATTORNEY FOR PETITIONER
BAR NUMBER 230626642
2319 MARKET PLACE, SUITE A
HUNTSVILLE, AL 35801
(205) 551-0300

61pp

QUESTIONS PRESENTED

1. Whether *Town of Newton vs. Rumery*, 480 U. S. 386, 107 S. Ct. 1187, 94 L. Ed.2d 405 (1987) applies in situations other than release-dismissal agreements.

2. If *Town of Newton vs. Rumery, supra,* applies, do the same tests of application apply.

3. If *Town of Newton vs. Rumery, supra,* applies, does its application override state law as set down by the highest court of that state.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

City of Huntsville, Alabama

Rex Reynolds

William E. Payne, Jr.

Jerry Hammonds

Richard Ottman

Ron Fudge

Jim Cook

Billy Ware

Walter Pride

Jesse Seroyer, Jr.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ]reported at_____; or
[ ]has been designated for publication but is not yet reported; or,
[X]is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ]reported at_____ , or
[ ]has been designated for publication but is not yet reported; or,
[X]is unpublished.

JURISDICTION

1.

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided the case was March 6, 1996.

[ ] No petition for rehearing was timely filed in the case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 8, 1996, and a copy of the order denying rehearing appears at Appendix H.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A-_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

NONE

STATEMENT OF THE CASE

William Donnie Ashley ("Ashley") was enticed into a sting operation involving the purchase of cocaine from an undercover agent. After completion of the transfer of cocaine for some cash, a ring, and copies of deeds to real property, Ashley exited the undercover agent's vehicle and proceeded to enter his own vehicle. At this time, Ashley observed several persons (eventually determined to be police officers) in plainclothes running toward him waving firearms. Ashley shifted his vehicle into gear and attempted to flee. Ashley's vehicle struck a tree, apparently knocking the vehicle out of gear, and Ashley's vehicle drifted backwards as Ashley attempted to get the vehicle into gear again. At approximately the same instance that Ashley got the vehicle back into gear, he was shot in the face at point blank range by a Huntsville police officer. Ashley managed to flee the scene, but was arrested after a chase of several miles. Ashley had an extensive hospital stay and several re-constructive surgeries.

When this case came to trial, Ashley perceived that his attorney was not ready for trial, and the trial court would not grant a continuance. While the trial judge waited in chambers, Ashley, his attorney, and the district attorney were involved in the courtroom plea bargaining the case. Ashley's choices were to go to trial and risk a 15

year to life sentence, or plea bargain for 3 years imprisonment. Under constant pressure to accept the bargain, and finally after urging by his family to accept the bargain, Ashley agreed to the 3 years of imprisonment.

The plea bargaining included a provision that Ashley would execute releases releasing the City of Huntsville, State Attorney General and certain agents thereof from civil liability for their actions. Ashley first saw this release provision approximately fifteen (15) minutes prior to the judge entering the courtroom to receive the plea bargain and Ashley's assent thereto. The court set a date for a hearing on the releases. On the set date, Ashley was in the hospital and had not executed any releases. The court directed the attorneys at the hearing to "try to get the releases up." The district attorney's office prepared a release, but Ashley refused to sign. No further proceedings were held in state court on the releases.

Ashley subsequently was incarcerated and served the three year sentence. Ashley appealed his conviction, which appeal is presently before the Eleventh Circuit Court of Appeals.

Ashley filed his action for violation of his civil rights *pro se* while in prison. The district court determined that the plea bargain agreement to execute releases was itself a release and granted summary judgment

for the defendants. The Eleventh Circuit Court of Appeals upheld the district court, specifically finding that *Town of Newton vs. Rumery, supra,* applied and that all the tests thereof were met in this case. This Petition follows.

REASONS FOR GRANTING THE PETITION

1. This Court in *Town of Newton vs. Rumery, supra,* addressed the great disadvantage of a defendant in a criminal case when the government obtains a release from all civil liability in return for a dismissal of the charges. This Court determined that such a release might not be void as against public policy in all cases, and set out various tests to determine applicability. However, this Court did not consider the non-dismissal type case. Where a dismissal is involved, the defendant can focus his full attention on the release agreement. However, where, as in this case, the defendant's mind is occupied by the anguish of accepting a prison sentence, it appears that a simultaneous release agreement surely must be void as against public policy. At the very least there should be a more stringent test than that set out in *Town of Newton vs. Rumery*. The Eleventh Circuit Court of Appeals has decided this important question of federal law that has not been, but should be, settled by this Court.

2. It has long been the law of Alabama through pronouncements of its Supreme Court that civil agreements based upon consideration of forbearance of criminal prosecution are void as a matter of public policy. Although the last pronouncement of this subject was many years ago, it is still the law of Alabama. *Hartsell vs. Roberts,* 64 So. 90 (Ala. 1913); *People's Bank & Trust Co. vs. Floyd,* 75 So. 940 (Ala. 1917); *Orman vs. Scharnagel,* 98 So. 123 (Ala. 1923); *Wilson vs. Singer Sewing Mach. Co.* 108 So. 358 (Ala. 1926). Consequently, the Eleventh Circuit Court of Appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort. This question should be settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

E. Ray McKee

E Ray McKee, Jr.
Attorney for Petitioner

Date: 6 August 1996

APPENDIX A--ELEVENTH CIRCUIT OPINION AND ORDER AFFIRMING DECISION OF DISTRICT COURT, FILED MARCH 6, 1996

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-6228

Non-Argument Calendar

D. C. Docket No. CV-92-H-2242-NE

WILLIAM DONNIE ASHLEY,

Plaintiff-Appellant,

versus

HUNTSVILLE, CITY OF, a municipal corporation of the State of Alabama; BILLY HAROLD WARE, individually and in his official capacity; JESSE SEROYER, individually and in his official capacity; WALTER PRIDE, individually and in his official capacity, JIM COOK, individually in his official capacity; et al.

Defendants-Appellees,

JAMES E. WORLEY, JR., individually and in his official capacity; et al.,

Defendants,

ROBERT BROUSSARD,

Objector.

Appeal from the United States District Court for the Northern District of Alabama

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(March 6, 1996)

Before ANDERSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

The issue presented in this appeal is whether the district court correctly determined that the defendants did not violate the plaintiff's constitutional rights because the plaintiff executed a valid binding release agreement.

The record demonstrates that the plaintiff-appellant, William Donnie Ashley ("Ashley"), filed this action under 42 U.S.C. § 1983 alleging that the defendants-appellees violated his constitutional rights. Specifically, Ashley claims deprivation of due process under the Fourteenth Amendment, unreasonable search and seizure and excessive force used against him during the course of his apprehension and arrest. The defendants maintain, and the district court held, that all of Ashley's claims are barred because Ashley released the City of Huntsville and the individual defendants through a valid plea agreement executed on June 4, 1991. Importantly, Ashley acknowledged during the colloquy on his guilty plea that he had agreed to the civil release as part of the plea bargain agreement and that he had discussed the civil release with his retained attorney. He further told the state trial judge who took his guilty plea that he did not need any additional time to consider his

plea agreement and that he was satisfied with the services of his attorney.

We are satisfied that the release given by Ashley in this case meets the requirements of Town of Newton v. Rumery, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987). In Rumery the Supreme Court held that a criminal defendant's agreement to release potential defendants in a civil action arising out of the arrest of the criminal defendant in exchange for either a reduction or a dismissal of criminal charges is valid and enforceable when (1) the release is voluntary, (2) there is no evidence of prosecutorial misconduct, and (3) the relevant public interests are not offended. Rumery, 480 U.S. at 398, 107 S.Ct. at 1194-95, 94 L.Ed.2d at 419.

The Court in Rumery also considered the following four factors to determine whether a release agreement was voluntarily executed: (1) the sophistication of the criminal defendant; (2) whether the defendant was in custody when he made the agreement; (3) whether the defendant was represented by counsel at the time he entered the agreement; and (4) whether the defendant had ample time to consider the agreement before signing it. Rumery, 480 U.S. at 394, 107 S.Ct. at 1192-93, 94 L.Ed.2d at 417.

The record in the instant case demonstrates that Ashley was a sophisticated businessman, was not in custody at the time of the giving of his release, was represented by adequate counsel, and was provided adequate time to consider the agreement. In sum, it appears clear to us that Ashley made

an informed, voluntary and rational decision to enter the agreement to release the City of Huntsville and its agents, in consideration for a lesser sentence and fine. Accordingly, we affirm the district court's grant of summary judgment in favor of the defendants and against Ashley.

AFFIRMED.

APPENDIX B--ELEVENTH CIRCUIT JUDGMENT AND ISSUE AS MANDATE, FILED MAY 17, 1996

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 95-6228

Non-Argument Calendar

D. C. Docket No. CV-92-H-2242-NE

WILLIAM DONNIE ASHLEY,

Plaintiff-Appellant,

versus

HUNTSVILLE, CITY OF, a municipal corporation of the State of Alabama; BILLY HAROLD WARE, individually and in his official capacity; JESSE SEROYER, individually and in his official capacity; WALTER PRIDE, individually and in his official capacity, JIM COOK, individually in his official capacity; et al.

Defendants-Appellees,

JAMES E. WORLEY, JR., individually and in his official capacity; et al.,

Defendants,

ROBERT BROUSSARD,

Objector.

Appeal from the United States District Court

for the Northern District of Alabama

Before ANDERSON, BIRCH and DUBINA, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: March 6, 1996

For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson

Deputy Clerk

ISSUED AS MANDATE: 5/17/96

APPENDIX C--DISTRICT COURT ORDER GRANTING PARTIAL SUMMARY JUDGMENT, ENTERED NOVEMBER 15, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

WILLIAM DONNIE ASHLEY,	)	
PLAINTIFF,	)	
VS.	)	CV-92-H-2242-NE
BILLY WARE, ET AL.,	)	
DEFENDANTS.	)	

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

The court has before it the August 18, 1994 motion for summary judgment filed by defendant City of Huntsville and the August 19, 1994 motion for summary judgment filed by defendants Richard Ottman, Jerry Hammonds, Ron Fudge, Billy Harold Ware, Jim Cook, Rex Reynolds, and William E. Payne Jr. ("individual defendants"). Pursuant to the court's August 19, 1994 order, those motions were deemed submitted for decision, without oral argument, as of September 16, 1994.

On August 31, 1992, plaintiff, proceeding pro se, filed a complaint in the United States District Court for the Middle District of Alabama invoking federal question jurisdiction and seeking to redress a variety of alleged constitutional violations by a

number of defendants. The action was transferred to this court, and on December 2, 1992, plaintiff filed an amended complaint pursuing claims only under 42 U.S.C. § 1983. On September 17, 1993, an attorney entered an appearance on behalf of plaintiff, and on April 13, 1994, Magistrate Judge Michael Putnam ordered counsel for plaintiff to file a comprehensive amended complaint in lieu of all previous complaints filed pro se. On May 12, 1994, counsel for plaintiff filed an amended complaint, and on May 13, 1994, counsel for plaintiff filed an amendment adding defendant Ron Fudge who had inadvertently been excluded from the May 12 amendment. The May 12 and 13 complaints allege claims of deprivation of due process under the Fourteenth Amendment, unreasonable search and seizure and excessive force in violation of the Fourth Amendment, cruel and unusual punishment and interference with medical treatment in violation of the Eighth Amendment, assault and battery, outrage, and violation of Article I, Section 35 of the Alabama Constitution. Plaintiff also seeks declaratory relief pursuant to 28 U.S.C. §§ 2101, 2102. By the court's August 9, 1994 order, defendants James E. Worley, Jr., David Sedenberry, Clinton Crabtree, Jeffrey Bennett, M. King, Doug Hall, Winnie Bailey, Rhonda Rosser, and Mickey Brantley were dismissed leaving as defendants the City of Huntsville, the individual defendants, Jesse Seroyer, and Walter Pride. The individual defendants filed their answer to the amended complaint on August 23, 1994 denying the material allegations of the complaint and asserting the following affirmative defenses:

the complaint fails to state a claim upon which relief can be granted;[1] each defendant is entitled to good faith or qualified immunity; plaintiff released the individual defendants from all liability pursuant to his plea bargain agreement;[2] plaintiff's claims are barred by judicial estoppel;[3] plaintiff's claims are barred by equitable estoppel;[4] plaintiff is collaterally estopped from contesting the validity of the release;[5] the individual defendants have substantive or discretionary function immunity from any of plaintiff's state law tort claims; the individual defendants have immunity from plaintiff's state law claims under Act 94-640, Acts of Alabama, 1994; claims against defendants Ottman, Hammonds, Fudge, and Reynolds are not actionable under section 1983; the section 1983 claims are not maintainable because the allegations contained in the complaint should be considered as a habeas corpus petition which requires exhaustion;[6] the official capacity claims are redundant; claims for punitive damages are not cognizable;[7] statements of defendants Fudge and Ottman to the press do not constitute the basis for a maintainable claim under section 1983; defendants Cook, Reynolds, and Payne had no reasonable opportunity to intervene; and acts of

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[1] Also asserted by Huntsville.
[2] Also asserted by Huntsville.
[3] Also asserted by Huntsville.
[4] Also asserted by Huntsville.
[5] Also asserted by Huntsville.
[6] Also asserted by Huntsville.
[7] Also asserted by Huntsville.

defendants did not constitute violations of section 1983.[8] Huntsville filed its answer to the amended complaint on August 25, 1994 denying the material allegations of the complaint and, in addition to the affirmative defenses indicated above, also asserted the following: contributory negligence; absence of proximate cause; the injuries alleged were caused by parties other than Huntsville; intervening or superseding cause; accord and satisfaction; the doctrine of compromise; that the City of Huntsville is not liable under respondeat superior; that the City of Huntsville is not liable for any wanton or intentional misconduct; immunity; the statute of limitations; all constitutional claims are due to be dismissed; plaintiff's state law claims are barred by Ala. Code. §§ 11-47-23 and 11-47-190 (1992); plaintiff's state law claims are improper for failure to state proper claims under the Alabama Constitution; conditional privilege; and protection of Ala. Code § 11-93-2.

In support of its motion for summary judgment, the City of Huntsville has filed a brief and supplement and submitted or referenced the following evidence: 1) the affidavits and attached exhibits of Marc Sandlin (two affidavits), and Jesse Seroyer; 2) portions of the deposition of plaintiff; 3) the decision of the Court of Appeals in CR92-0738; and 4) the transcript of plaintiff's hearing before Judge William Page. Counsel for the individual defendants

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[8] Also asserted by Huntsville.

also filed a brief and supplement with the court and submitted or referenced the following evidence: 1) affidavits of Billy Harold Ware, William Payne, Marc Sandlin (two affidavits), Jesse Seroyer, Rex Reynolds, Jim Cook, Ronald Fudge, Richard Ottman, and Jerry Hammonds; 2) portions of the deposition of the plaintiff; 3) decision of the Court of Criminal Appeals, CR92-0738: 4) the transcript of the hearing before Judge Page; and 5) a copy of the case action summary sheet in State of Alabama v. Ashley. In opposition to these motions plaintiff has filed a brief and the following evidence: 1) the affidavit of William Donnie Ashley; 2) copy of a motion for preliminary hearing and order in Madison County criminal case, State v. Ashley; 3) a copy of plaintiff's indictment and return of indictment; 4) affidavit of Hon. Ralph H. Grider; 5) December 17, 1992 affidavit of Marc Sandlin; 6) deposition testimony of James Worley, Robert Broussard, Clinton Crabtree, Rex Reynolds, Walter Pride, Jesse Seroyer, William Donnie Ashley, and Billy Ware; 7) copy of transcript of oral testimony by CID; 8) copy of transcript of shooting review board; and 9) copy of videotape of shooting incident involving the plaintiff. The individual defendants and the City of Huntsville have submitted reply briefs addressing plaintiff's responses to their motions, and plaintiff has submitted a response.

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing the nonmoving party has failed to present evidence in support of some element of his case on which he bears the ultimate burden of proof. Id. at 322-23: see Fed. R. Civ. P. 56(a) and (b).

Once the moving party has met his burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his own affidavits, or by the depositions, answers to interrogatories, and admissions of file, designate specific facts showing that there is a genuine issue for trial. Celotex, 477 U.S. at 324. Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient

to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322.

The substantive law will identify which facts are material and which are irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id., 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Id. at 249.

The evidence submitted reveals the following facts relevant to the two motions for summary judgment: Plaintiff was arrested on September 5, 1990 for trafficking in cocaine in excess of one kilogram, but less than ten kilograms, in violation of Ala. Code § 13A-12-27(2)(c). After being hospitalized for gunshot wounds obtained during his arrest, plaintiff retained Marc Sandlin, an attorney in Huntsville, Alabama to defend him against these criminal charges. See Affidavit of Marc Sandlin, filed as Exhibit 5 to the January 22, 1993 Special Report and Motion for Summary Judgment, Huntsville's evidentiary submission number two. On June 4, 1991, plaintiff signed a plea agreement in which he plead guilty to the charge of trafficking in cocaine in violation of Ala.

Code § 13A-12-231(2)(a).[9] The plea agreement also contained a provision which stated:

> the defendant shall sign a release absolving the City of Huntsville, Alabama and the Alabama Attorney General's office[10] and its agent from any and all liability arising out of the defendant's arrest and apprehension...

See Plea Agreement, exhibit to affidavit of Marc Sandlin, filed as Exhibit 5 to the January 22, 1993 Special Report and Motion for Summary Judgment, Huntsville's evidentiary submission number two. It is this portion of the plea agreement that provides the basis for the two motions for summary judgment. Plaintiff states that the first he heard of any plea bargain was on the last Friday in May, 1991 when Sandlin asked him if he would be willing to plea bargain. See

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[9] The charge to which plaintiff plead guilty carried a mandatory minimum sentence of three years and a fine of $50,000. The charge initially brought against plaintiff carried a mandatory minimum sentence of fifteen years and a $250,000 fine.

[10] The phrase "and the Alabama Attorney General's office" is included as an insert and referenced by an arrow. See Plea Agreement, exhibit to affidavit of Marc Sandlin, filed as Exhibit 5 to the January 22, 1993 Special Report and Motion for Summary Judgment, Huntsville's evidentiary submission number two.

Ashley Depo. Vol. II p. 155. Plaintiff stated that he refused any plea agreement; that Sandlin threatened to withdraw; and that plaintiff then tried to retain new counsel. Id. at 182. Plaintiff contacted and retained a second attorney, Mark McDaniel, on Monday, June 4, 1991, and Mr. McDaniel was present with the plaintiff on June 4, 1991, the day that plaintiff signed the plea agreement and was sentenced. Id. at 183-85. Plaintiff stated in deposition testimony that three different times on June 4, 1991, Sandlin tried to convince plaintiff to agree to a plea bargain, but plaintiff refused. After plaintiff, Sandlin, and members of plaintiff's family met and the family members encouraged plaintiff to accept the plea bargain, he finally signed the plea agreement. Id. at 189, 200. Plaintiff states that he did not agree to the terms of the plea agreement by signing and that he was at no time prior to the plea aware of all the provisions in the plea agreement. Id. at 201-202.[11] Pursuant to the plea agreement, Judge Page sentenced plaintiff to three years imprisonment and a $50,000 fine. At the request of plaintiff's counsel, a sentencing hearing was set for July 26, 1991. However, Judge Page sentenced plaintiff at the June 4, 1991 hearing because the sentence had been agreed upon. See Transcript of Proceedings before Judge Page, June 4, 1991, p. R-10, individual defendants evidentiary submission

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[11] Plaintiff also states that the release provision was inserted only fifteen minutes before he appeared before the court. See Affidavit of William Donnie Ashley.

number nine. The record shows that the separate sentencing hearing was requested by Sandlin for "one reason" and that was so that plaintiff could receive medical attention before he was incarcerated. Id. at R-1. Plaintiff was not present for the July 26 hearing, but Judge Page ordered plaintiff to begin serving his sentence on September 30, 1991 and told Sandlin to be sure and "get the releases up." Id. at R-11, R-12. Plaintiff began serving his sentence on September 30, 1991, but when plaintiff was actually presented with a written release, he refused to sign. See Affidavit of Marc Sandlin, filed as Exhibit 5 to the January 22, 1993 Special Report and Motion for Summary Judgment, Huntsville's evidentiary submission number two.

On December 2, 1992, plaintiff filed a post-conviction petition under Ala. R. Crim. P. 32 seeking to have his guilty plea vacated on the basis of ineffective assistance of counsel. This petition was dismissed by Judge Page. The Alabama Court of Criminal Appeals affirmed Judge Page's decision, and certiorari was denied by the Alabama Supreme Court. See December 3, 1993 decision of Court of Appeals, individual defendants evidentiary submission number eight. Plaintiff is now before this court seeking damages from the City of Huntsville and the individual defendants.

The City of Huntsville and the individual defendants assert as a basis for their motions that plaintiff's claims are

prohibited because plaintiff released the City of Huntsville and the individual defendants through the plea agreement signed June 4, 1991.[12] In response to the all of the defendants motions, the plaintiff has argued that there was no valid release and that the provision in the plea agreement was simply an agreement to agree. Plaintiff further asserts that there was prosecutorial misconduct; that any such release agreement violates public policy; and that the court did not accept the release.

In Town of Newton v. Rumery, 480 U.S. 386 (1987), the Supreme Court held that settlement of § 1983 claims against public officials in exchange for dismissal of criminal charges is not per se impermissible. Rumery established a three prong test to determine whether a release agreement in connection with a plea bargain would be considered valid. The first question that must be addressed is whether the plaintiff voluntarily waived his rights. Secondly, there must be no evidence of prosecutorial

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[12] The court is not convinced by plaintiff's argument that the release provision of the plea agreement does not address the agents of the City of Huntsville. A simple examination of the written agreement shows that the Alabama Attorney General's office was added to a phrase that read "the City of Huntsville and its agents". Such an addition does not change the intended and obvious meaning of the provision.

misconduct. Finally, the agreement cannot offend relevant public interests. Id. at 398.

There are several factors to be considered when deciding whether a release agreement in this context was entered into voluntarily or whether the plaintiff was coerced into signing the agreement: 1) the sophistication of the plaintiff; 2) whether or not the plaintiff is in custody; 3) whether the plaintiff was represented by adequate counsel; 4) the time given to consider the agreement; 5) the nature of the charges against the plaintiff; and 6) whether the agreement was judicially supervised. Id. at 394, 401-402.

It is well established in this case that plaintiff is a sophisticated businessman. Plaintiff has been the owner and operator of three businesses, a fifty percent owner in another, and has been a licensed real estate broker for twelve to fifteen years. See Ashley Depo. pp. 19-27). It is also clear that plaintiff was not in custody at the time the release agreement was entered into. After his arrest, plaintiff was hospitalized for a time and was not in custody on June 4, 1991, the date set for his trial. See Affidavit of Marc Sandlin ¶ 4, Huntsville's evidentiary submission number three.

One of plaintiff's grounds for challenging the release provision of the plea agreement is that plaintiff was not

adequately represented by counsel. Plaintiff argues that his attorney, Marc Sandlin, presented him with the idea of a plea bargain three days before the trial date and that because Sandlin was unprepared for trial, he threatened to withdraw if plaintiff did not agree to plea bargain. Plaintiff further argues that the release provision was inserted at the last minute and that Sandlin did not adequately inform him of the consequences of signing the plea agreement.[13] Plaintiff stated that he rejected the plea agreement when it was initially proposed to him on Friday, May 31, 1991, and rejected it again three times on the morning of June 4, 1991. It was not until later, after consulting with members of his family and Sandlin, that plaintiff agreed to, and ultimately signed, the plea agreement. Plaintiff stated that he did not read the provisions of the plea agreement before he signed it, nor did he discuss the provisions of the agreement with Sandlin or McDaniel before he signed. See Ashley Depo. p. 216. However, in his colloquy with Judge Page plaintiff stated that he was satisfied with the advice and counsel of his attorney. The following exchange took place:

> The Court: Mr. Ashley, in case number 90-1855, you are charged under an

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[13] As evidence of his dissatisfaction with his attorney, plaintiff shows that he contacted a second attorney, Mark McDaniel, for additional representation at the June 4, 1991 court date.

indictment returned by the Grand Jury charging you with trafficking in cocaine. It charges that you did traffic in cocaine involving 2.3 pounds of cocaine or any mixture containing cocaine. The State has moved to amend the indictment to charge you with unlawfully trafficking in cocaine wherein the amount of cocaine is 28 grams or more, but less than 500 grams. Do you understand that, sir?

Mr. Ashley: Yes, sir.

The Court: Do you consent to that motion?

Mr. Ashley: Yes, sir.

The Court: To the indictment as thus amended, how do you plead?

Mr. Ashley: Guilty.

The Court: Have you discussed this with your lawyer?

Mr. Ashley: Yes, sir.

The Court: Are you satisfied with the advice and counsel of your lawyer thus far?

Mr. Ashley: Yes, sir.

See Transcript of Proceedings before Judge Page, June 4, 1991, p. R-4, R-8, individual defendants' evidentiary submission number nine. The court is further convinced of the adequacy of representation by the outcome of the Rule 32 petition filed by plaintiff alleging ineffective assistance of counsel. In affirming the circuit court's dismissal of plaintiff's petition, the Alabama Civil Court

of Appeals noted that plaintiff, although he had an opportunity to do so, gave no indication of his dissatisfaction with his attorney at the time of the plea. The Court of Civil Appeals also remarked that the circuit judge who dismissed the petition, Judge Page, was also the judge who presided over the plaintiff's hearing. Thus, Judge Page's dismissal warranted significant deference since he had an opportunity to observe the conduct of the plaintiff's attorney in handling plaintiff's criminal case. It is clear from the evidence submitted that plaintiff was adequately represented by capable counsel throughout his criminal prosecution and during the plea negotiations.[14]

Plaintiff strongly argues that because he became aware of the release provision only fifteen minutes before appearing before the court he did not have time to adequately consider the release provision. In Rumery, three days was determined to have been an adequate amount of time to consider the release/dismissal agreement. Rumery, 480 U.S. at 394. In this case, plaintiff argues that he only briefly glanced at the release provision and did not have time to consider it fully. See Affidavit of William Donnie

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[14] Because the court is satisfied that plaintiff was adequately represented on the date of his plea, the question of the applicability of collateral estoppel or issue preclusion concerning the adequacy of representation need not be addressed.

Ashley.[15] However, plaintiff responded affirmatively to Judge Page when asked if he agreed to release the Alabama Attorney General's office and the City of Huntsville and their agents. Plaintiff also stated that he had discussed all of this with his attorney. The following exchange took place:

> The Court: Now, I understand that you have in addition to that made a plea bargain agreement with the prosecution whereby you will release the Alabama Attorney General and the City of Huntsville and their agents from any liability arising out of your arrest or apprehension. You agreed to do that as part of the plea bargaining process?
>
> Mr. Ashley: Yes, sir.
>
> The Court: And you will enter a consent judgment in Case Number CV91-816 for the condemnation of certain personal property. You have agreed to do that?
>
> Mr. Ashley: Yes, sir.
>
> The Court: You have discussed all of this with your lawyer?
>
> The Court: Mr. Ashley?
>
> Mr. Ashley: Yes, sir.

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[15] In deposition testimony, plaintiff stated that he never actually read the plea agreement and was not aware of the terms of the release provision. See Ashley Depo. p. 201.

See Transcript of Proceedings before Judge Page, June 4, 1991, p. R-8, individual defendants evidentiary submission number nine.[16] Despite this exchange with Judge Page, plaintiff now asserts that he did not have time to consider the release provision or the ramifications of signing the plea agreement. Plaintiff does not contend that he could not understand the release provision, he only states that he did not fully read the plea agreement. Plaintiff is an intelligent businessman who was facing a substantial amount of time in jail. He certainly could have understood the terms of the agreement had he fully read them, and the record of the hearing before Judge Page indicates that plaintiff did understand what he was signing.

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[16] Plaintiff's counsel in its reply brief argues that this court certainly understands that the appearance before a judge prior to entering a plea is a mere formality. The court has no such understanding and believes that the actual appearance before the judge prior to entering a plea is, in fact, required by Rule 14.4 of the Alabama Rules of Criminal Procedure which states that before accepting a plea, the court must address the defendant personally in open court and inform him of various rights set out by the rule. Id. The judge must also make a determination that the plea is made voluntarily an with full knowledge of its effect. Plaintiff also states that this court knows that in every plea bargain situation plaintiff is instructed to inform the court that this is what he wants. The court has no such knowledge.

Plaintiff even stated that he needed no additional time to go over the plea agreement with his lawyer. Undoubtedly, the plaintiff is unhappy with his decision, however, based upon the record of the hearing before Judge Page and the evidence submitted, the court is satisfied that plaintiff had ample time to consider the plea agreement and the release provision.

The last two factors to be considered when determining whether a release agreement is entered into voluntarily were addressed in Rumery by Justice O'Connor in her concurring opinion. The first additional factor is a consideration of the nature of the charges against the plaintiff. Justice O'Connor reasoned that the greater the charge the greater the coercive effect to plea bargain and sign a release. Rumery, 480 U.S. at 401. Plaintiff in this situation was charged with a violation of Ala. Code § 13A-12-231(2)(c) which carried a mandatory minimum sentence of fifteen years and a $250,000 fine. Plaintiff plead guilty to Ala. Code § 13A-12-231(2)(a) which carried a mandatory minimum sentence of three years and a fine of $50,000. While plaintiff was charged with a serious crime, a mandatory minimum of fifteen years would not be considered one of the greater felonies under Alabama law. Justice O'Connor's second additional factor to be considered is whether the release agreement was judicially supervised. In this case there is no question that the release agreement was judicially supervised. In his colloquy with Judge Page, plaintiff acknowledged that he had agreed to

release the City of Huntsville and the individual defendants and stated that he had discussed such a release with his lawyer. Plaintiff's counsel, in fact, agrees that the release agreement was judicially supervised. However, plaintiff argues that Judge Page was so concerned with the release agreement that he set a separate hearing on this issue. Plaintiff's basis for this argument is a statement by Judge Page at the June 4, 1991 hearing at which, after sentencing the plaintiff, Judge Page said, "I will set you a hearing on your agreement to execute releases for 11:00 o'clock on July 26th of this year." See Transcript of Proceedings before Judge Page, June 4, 1991, p. R-11, individual defendants' evidentiary submission number nine. Plaintiff further argues that because Judge Page set this separate hearing and because he did not enter a separate order of release, the court did not ever accept the release agreement. Plaintiff's argument is not convincing. Plaintiff's attorney, Marc Sandlin, requested that Judge Page set a separate sentencing date for "one reason" and that was to allow plaintiff time to seek medical attention before he began serving his sentence. Id. at R-2. Further, the case action summary signed by Judge Page states, "Case is set for 11:00 A.M. on July 26, 1991 for filing of releases." See Case Action Summary Continuation, individual defendants' evidentiary submission number ten. Judge Page did not envision or expect a hearing as to whether plaintiff had agreed to the releases. The release agreement had already been agreed upon, and Judge Page was simply looking for the documentation of this release.

Plaintiff's argument that the court had not accepted the plea agreement and that Judge Page set a separate hearing for the purpose of determining the validity of the releases is based upon pure semantics. Clearly, Judge Page acknowledged and accepted the release agreement as part of the plea agreement. As a favor to the plaintiff, Judge Page set a hearing on July 26, and because the sentence was already agreed upon, Judge Page simply stated that the purpose of the hearing was to present the court with the releases that were already agreed upon and accepted by the court. This conclusion is further evidenced by the exchange between Judge Page and Sandlin on July 26, 1991.

> The Court: On the matter of Donnie Ashley, Mr. Ashley is supposed to have some releases signed up and I understand that those are not ready because he is in the hospital?
>
> Mr. Sandlin: Yes, sir.
>
> The Court: I'm going to allow him to report and start serving his sentence September 30th at 5:00 o'clock in the afternoon. In the meantime, try to get the releases up.

See Transcript of Proceeding before Judge Page, July 26, 1991, individual defendants' evidentiary submission number nine. The court had accepted the release provision as part of the plea agreement and was only looking for

the paperwork signifying the release agreement.[17]

The second component of the Rumery analysis for determining the validity of a release agreement is whether there was any prosecutorial misconduct in obtaining the agreement. The Supreme Court in Rumery agreed with the contention that there was some concern that, at times, in order to obtain a release agreement, a prosecutor might trump up charges, suppress evidence of police misconduct, or leave unremedied deprivations of constitutional rights. Rumery, 480 U.S. at 394. Plaintiff argues that because Assistant District Attorney Robert Broussard "lied" to District Judge Ralph Grider on October 3, 1990, the date set for plaintiff's preliminary hearing, he was denied information which would have aided him in making an informed decision with regard to the plea agreement. Plaintiff argues that Broussard told Judge Grider on October 3 that plaintiff had already been "true billed", thus plaintiff was not entitled to a preliminary hearing. However, plaintiff states that the actual indictment was not signed and handed down until October 5,

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[17] Plaintiff's argument that there was no release because a separate order of release was not entered is equally unconvincing. Plaintiff shows no evidence that such an order is necessary or customary when a court accepts a plea agreement. In fact, the court is satisfied that such an order is routinely not issued. See Broussard Depo. p. 27.

1990.[18] The actions of Broussard in this situation simply do not rise to the level of prosecutorial misconduct contemplated by the Court in Rumery. While it is true that an indictment must be in writing, Broussard stated in deposition testimony that it was his understanding that a grand jury "true bills" someone when they vote on them and not when the indictment is signed. See Broussard Depo. p. 12. Further, Broussard stated that he was certain that the indictment had been voted on because he checked with the foreman of the grand jury. Id. at 15. Although, plaintiff may not have been formally indicted until October 5, 1990, it is all to clear that Broussard was not intentionally "lying" to Judge Grider when he stated that plaintiff had been "true billed" in order to deny the plaintiff the benefit of discovery. The evidence clearly shows that, to the best of his knowledge, Broussard was telling the court what he believed to be true. Further, Sandlin was present at this hearing and did not object to Broussard's verbal verification of the indictment and the subsequent denial of a preliminary hearing. Plaintiff argues

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[18] An examination of the evidence reveals that Broussard believed the Grand Jury to have voted to indict plaintiff on October 3, 1990 even though the actual signed indictment was not returned to the court until October 5, 1990. Although Broussard's belief was not based upon his own personal knowledge, and thus not proper for consideration on the defendants' motions for summary judgment, Broussard's belief is evidence of his good faith intentions.

that this denial of a preliminary hearing prejudiced him in that he was not able to obtain valuable information that would have aided him in making an informed decision concerning the release agreement. This contention is without merit. The date set for the preliminary hearing was October 3, 1990 and the date on which plaintiff plead guilty was June 4, 1991. Plaintiff had eight months in which to obtain evidence and information concerning the charges against him, and the court is certain that the preliminary hearing would not have provided plaintiff with any additional information or evidence not subsequently obtained prior to the date of the plea agreement.

The final element of the Rumery analysis is whether enforcement of the release agreement violates relevant public interests. The majority in Rumery suggested that this prong of the analysis can be satisfied if the prosecutor demonstrates that obtaining the release agreement was motivated by an independent, legitimate criminal justice objective. Rumery, 480 U.S. at 398. The evidence submitted shows that obtaining the release agreement relieved the state of the burden of a long trial and the potential burden of defending itself and its agents in a lengthy civil suit. Indeed this prong of the Rumery analysis is probably the easiest to satisfy, and relevant public interest has even been found where the agreement aids in the disposition of a heavy case load. See Coughlen v. Coots, 5 F.3d 970,975 (6th Cir. 1993). There is no evidence in this case that

Broussard or any other member of the district attorney's office "trumped up" or increased the initial charges against the plaintiff in order to obtain the release agreement. Plaintiff's argument that enforcement of the release agreement would violate the public policy of Alabama is unconvincing.

The court is satisfied that the release provision of the plea agreement signed June 4, 1991 by plaintiff is valid in that it meets all of the requirements set forth in Rumery. However, plaintiff argues that the release provision is not enforceable based upon contract principles because it is an agreement to agree, and thus, not enforceable because all of the terms were not contained therein. As a basis for this argument plaintiff argues that the essential term releasing the individual defendants was not present in the release provision and that the term "shall" was used in establishing plaintiff's obligation to later sign a release. The repeated argument of plaintiff's counsel that because of the insertion by an arrow of the Alabama Attorney General's office into the agreement there was no release of the individual defendants is baseless. Even a cursory examination of the plea agreement shows that both the City of Huntsville and its agents and the Alabama Attorney General's office and its agents were intended to be included by the parties. The fact that this is one of the essential terms plaintiff contends was left out of this agreement shows the overall transparency of plaintiff's argument. Even less convincing is

the argument that because the word "shall" was used, the release provision was not an agreement but an agreement to agree. Plaintiff's interpretation that this provision afforded him time to consider the release is without merit. Certainly, the district attorney's office did not bargain for plaintiff's future contemplation of this agreement. The plaintiff entered a valid, enforceable agreement to release the City of Huntsville, the Alabama Attorney General's office, and their agents. This was not an agreement to agree and was binding on the parties when plaintiff entered his plea.[19] [20]

Plaintiff also argues that the individual defendants do not have standing to enforce the agreement because they were not parties to the agreement. This argument is based solely on the assumption that there is no release agreement, and must necessarily fall upon a finding of a valid, enforceable release agreement. By stating that plaintiff

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[19] Although the court does not believe there was an agreement to agree, even when such an interpretation is considered, a conclusion that all essential elements were present must be reached.

[20] Plaintiff further argues that there was no oral agreement based upon the colloquy with Judge Page because Judge Page was not a party to the agreement. Although this may be true, the exchange between plaintiff and the court is certainly evidence of the prior agreement to release and plaintiff's intent with regard to this release.

received nothing in return for this agreement, plaintiff is seemingly arguing that there was no valid consideration. However, in exchange for plaintiff's acceptance of the plea agreement, the charge against him was reduced from one carrying a maximum minimum term of imprisonment of fifteen years and a $250,000 fine to a maximum minimum term of imprisonment of three years and a $50,000 fine. There was adequate consideration.[21]

In conclusion, the court is satisfied that there was a valid, binding release agreement as of June 4, 1991. The agreement was entered into voluntarily, without prosecutorial misconduct, and it is not against relevant public policy. Plaintiff entered this agreement with full knowledge of the contents and ramifications of the release provision. He cannot now attempt to void this agreement by claiming ignorance and duress.

For the foregoing reasons, the August 18, 1994 motion for summary judgment and the August 19, 1994 motion for summary judgment are GRANTED and judgment is hereby ENTERED in favor of the City of Huntsville, Richard Ottman, Jerry Hammonds, Ron Fudge, Billy Harold Ware, Jim Cook, Rex Reynolds, and William E. Payne, Jr. The entry of this order of partial summary judgment shall not affect

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[21] Because there was a valid release agreement that was enforceable as of June 4, 1991, the various issues of estoppel need not be addressed.

the claims of plaintiff against Walter Pride or Jesse Seroyer who are the only remaining defendants.

The August 9, 1994 and August 31, 1994 motions of plaintiff for clarification are MOOT; the August 9, 1994 motion of plaintiff to strike is DENIED; the October 13, 1994 motion of the individual defendants to strike is DENIED; and the September 7, 1994 motion of plaintiff to strike is GRANTED.

DONE this 15th day of November, 1994.

/s/ James H. Hancock
UNITED STATES DISTRICT JUDGE

APPENDIX D--DISTRICT COURT ORDER GRANTING SUMMARY JUDGMENT, ENTERED DECEMBER 29, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

WILLIAM DONNIE ASHLEY,	)	
PLAINTIFF,	)	
VS.	)	CV-92-H-2242-NE
BILLY WARE, ET AL.,	)	
DEFENDANTS.	)	

ORDER GRANTING SUMMARY JUDGMENT

The court has before it the November 21, 1994 motion for summary judgment filed by defendant Jesse Seroyer. Pursuant to the court's November 28, 1994 order that motion was deemed submitted without oral argument as of December 27, 1994.

The court's November 15, 1994 order granting partial summary judgment set out, at some length, the extended history of this action. The November 15, 1994 also granted summary judgment in favor of the City of Huntsville, Richard Ottman, Jerry Hammonds, Ron Fudge, Billy Harold Ware, Jim Cook, Rex Reynolds, and William E. Payne Jr. leaving Jesse Seroyer and Walter Pride as the only remaining defendants in this action.

In support of its motion for summary judgment, defendant Jesse Seroyer has submitted a brief referencing evidence previously submitted by the other defendants.[1] Plaintiff has filed a notice of re-submittal of previously submitted evidentiary matters.

At the time of plaintiff's arrest on September 5, 1990, defendant Jesse Seroyer was employed by the State of Alabama Attorney General's office. See Seroyer depo. p.6. For purposes of this order, the court adopts the remaining facts as set forth in the November 15, 1994 order.

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, which it

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[1] The November 15, 1994 order also sets out in detail what evidentiary submissions are before the court.

believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing the nonmoving party has failed to present evidence in support of some element of his case on which he bears the ultimate burden of proof. Id. at 322-23; see Fed. R. Civ. P. 56(a) and (b).

Once the moving party has met his burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his own affidavits, or by the depositions, answers to interrogatories, and admissions of file, designate specific facts showing that there is a genuine issue for trial. Celotex, 477 U.S. at 324. Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322.

The substantive law will identify which facts are material and which are irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id., 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Id. at 249.

Based upon the reasoning in the court's November 15, 1994 order and the plea agreement signed by the plaintiff, the court is satisfied that plaintiff signed a valid, binding agreement releasing the Alabama Attorney General's office and its agents from any and all liability arising out of the plaintiff's arrest and apprehension. Thus, defendant Jesse Seroyer's motion for summary judgment is GRANTED, and judgment is hereby ENTERED in favor of Jesse Seroyer.

The only remaining defendant in this action is Walter Pride. The court intends to grant summary judgment in favor of Walter Pride unless plaintiff, by January 30, 1995, shows cause why such summary judgment should not be granted.[2]

DONE this 29th day of December, 1994.

/s/ James H. Hancock

UNITED STATES DISTRICT JUDGE

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[2] All claims that would be dismissed by summary judgment in favor of defendant Walter Pride would be dismissed without prejudice to plaintiff with regard to any issues which might be raised by plainiff on appeal from the summary judgment heretofore entered in favor of the other defendants and/or in favor of defendant Jesse Seroyer.

APPENDIX E--DISTRICT COURT ORDER OF FINAL ORDER GRANTING SUMMARY JUDGMENT, ENTERED FEBRUARY 1, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

WILLIAM DONNIE ASHLEY,	)	
PLAINTIFF,	)	
VS.	)	CV-92-H-2242-NE
BILLY WARE, ET AL.,	)	
DEFENDANTS.	)	

FINAL ORDER GRANTING SUMMARY JUDGMENT

In accordance with the memorandum of opinion this day entered, it is ORDERED, AWUDGED and DECREED that summary judgment in favor of defendant Walter Pride is hereby GRANTED, and judgment in that defendant's favor is ENTERED.

As this order disposes of the remaining claims in this action, the clerk is directed to close this case. Costs are taxed against plaintiff.

DONE this 1st day of February, 1995

/s/ James H. Hancock
UNITED STATES DISTRICT JUDGE

APPENDIX F--DISTRICT COURT MEMORANDUM OF OPINION, ENTERED FEBRUARY 1, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

WILLIAM DONNIE ASHLEY,	)	
PLAINTIFF,	)	
VS.	)	CV-92-H-2242-NE
BILLY WARE, ET AL.,	)	
DEFENDANTS.	)	

MEMORANDUM OF OPINION

On December 29, 1994 the court indicated its intention to grant summary judgment in favor of the remaining defendant, Walter Pride, who is appearing pro se unless plaintiff showed cause by January 30, 1995 why such summary judgment should not be granted. The January 17, 1995 objection by plaintiff is not sufficient cause, and no other showing has been made.

The court's November 15, 1994 order granting partial summary judgement set out, at some length, the extensive history of this action. The November 15, 1994 order also granted summary judgment in favor of the City of Huntsville, Richard Ottman, Jerry Hammonds, Ron Fudge, Billy Harold Ware, Jim

Cook, Rex Reynolds, and William E. Payne Jr. The court's December 29, 1994 order in addition to indicating the court's intention to grant summary judgment in favor of defendant Walter Pride also granted summary judgment in favor of defendant Jesse Seroyer.

The November 15, 1994 order also specifically set forth what evidence is before the court, and no other evidence has been presented with regard to the claims against defendant Walter Pride. In his May 12, 1994 amended complaint, plaintiff states that defendant Walter Pride, "at all times herein mentioned", was an agent to Billy Harold Ware and was employed by him with the approval of the defendant City of Huntsville. See 5/12/94 amended complaint ¶ 14. The document filed with the court on January 20, 1995 by defendant Walter Pride supports this assertion. Plaintiff also asserts that defendant Walter Pride, "who had two pending narcotics charges against him", agreed to "set up" the defendant and told defendant Ware that he could arrange for plaintiff to purchase drugs. See plaintiff's September 16, 1994 brief, p.1. For purposes of this order, the court adopts the remaining facts as set forth in the November 15, 1994 order.

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Once the moving party has met his burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his own affidavits, or by the depositions, answers to interrogatories, and admissions of file, designate specific facts showing that there is a genuine issue for trial. Celotex, 477 U.S. at 324. Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322.

The substantive law will identify which facts are material and which are irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id., 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Id. at 249.

Plaintiff has alleged and defendant Walter Pride agrees that Pride was, at all times, acting as the agent of Billy Harold Ware and the City of Huntsville. Assuming, although not deciding, that Walter Pride was acting as an agent of the City of Huntsville, the court is satisfied, based upon the

reasoning in the November 15, 1994 order and the plea agreement signed by the plaintiff, that plaintiff in fact signed a valid, binding agreement releasing the City of Huntsville and its agents[1] from any and all liability arising out of the plaintiff's arrest and apprehension. Thus, summary judgment is due to be granted in favor of Walter Pride, and a separate Final Order will be entered.

DONE this 1st day of February, 1995

/s/ James H. Hancock
UNITED STATES DISTRICT JUDGE

[1] Again, for the purposes of this order only, Walter Pride is assumed to be an agent of the City of Huntsville.

APPENDIX G--DISTRICT COURT ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENTS, ENTERED FEBRUARY 15, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

WILLIAM DONNIE ASHLEY,	)	
PLAINTIFF,	)	
VS.	)	CV-92-H-2242-NE
CITY OF HUNTSVILLE,	)	
ET AL.,	)	
DEFENDANTS.	)	

MOTION TO ALTER OR AMEND JUDGMENTS

Comes now the Plaintiff in the above-styled cause and shows unto the Court as follows:

1. The uncontested evidence in this case is that the State of Alabama prepared a release and Ashley refused to sign it. This act by the State is substantial evidence that the plea agreement in the state criminal case was not intended to be a release of civil causes of action.

2. The uncontested evidence in this case is that the trial court in the criminal proceeding, in a hearing subsequent to the

plea, advised the attorneys for Ashley and the State to "try to get the releases up." This act by the trial court is substantial evidence that neither the plea agreement nor Ashley's interrogation by the trial court constitutes a release of civil causes of action.

3. The uncontested evidence in this case is that the State of Alabama prepared the plea agreement, a plain reading of which does not provide for Ashley's release of the agents of the City of Huntsville, and which, in any case, does not on its face purport to be a release, but in fact refers to releases to be executed.

4. This Court's undertaking to determine the intent of the parties at the time the plea agreement was entered into, and this Court's resolution of the ambiguities of the plea agreement are clear invasions of the province of the jury.

5. At best, with respect to the issue of release, the plea agreement is an executory contract, the breach of which the State of Alabama may sue

DENIED

/S/ James H. Hancock 2/25/95

APPENDIX H--ELEVENTH CIRCUIT ORDER DENYING REHEARING, FILED MAY 8, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6228

WILLIAM DONNIE ASHLEY,

Plaintiff-Appellant,

versus

HUNTSVILLE, CITY OF, a municipal corporation of the State of Alabama; BILLY HAROLD WARE, et al.,

Defendants-Appellees,

JAMES E. WORLEY, JR., individually and in his official capacity; et al.,

Defendants,

ROBERT BROUSSARD,

Objector.

On Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion_____, 11th Cir., 19___,
_____F.2d_____).

BEFORE: ANDERSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)